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Decision

Matter of: Northrop Grumman Information Technology, Inc.; Broadwing Communications LLC; Level 3 Communications, Inc.; Qwest Government Services, Inc.; MCI WORLDCOM Communications, Inc.

File: B-295526; B-295526.2; B-295526.3; B-295526.4; B-295526.5; B-295526.6; B-295526.7; B-295526.8; B-295526.9; B-295526.10

Date: March 16, 2005

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DIGEST

Protest is sustained where Department of Treasury negotiated during procurement for network services a memorandum of understanding (with the Office of Management and Budget and General Services Administration's Federal Technology Service) that significantly changed the approach set forth in solicitation and Federal Acquisition Regulation to determining whether to exercise the options, making it significantly less likely that the options would be exercised, and thus materially altering the basis upon which offerors prepared their proposals.

DECISION

Northrop Grumman Information Technology, Inc., Broadwing Communications LLC, Level 3 Communications LLC, Qwest Government Services, Inc., and MCI WORLDCOM Communications, Inc. protest the Department of the Treasury, Internal Revenue Service's (IRS), award of a contract to AT&T, under request for proposals (RFP) No. TIRNO-04-R-00001, for the Treasury Communications Enterprise (TCE) network. The protesters challenge the evaluation of proposals and several other aspects of the procurement.

We sustain the protests.

BACKGROUND

Treasury's current network consists of over 1,000 locations throughout the United States, and in Guam, Bermuda, the Bahamas, and Europe, serviced under the agency's Treasury Communications Services (TCS) contract with NG (expiring in September 2004). Treasury has multiple bureaus with independent telecommunications networks, all of which are connected through a hierarchical, distributed hub-and-spoke architecture. The solicitation statement of work (SOW) provided for replacement of the TCS network with a TCE network offering a framework for developing a Treasury-wide secure enterprise network enabling the convergence of data, voice and video technologies into a single network infrastructure that will support the efficient operation of applications and services across the entire Treasury operating environment. The resulting converged communications transport framework is intended to allow the Treasury and its bureaus to deploy secure, robust, eGov-enabled business solutions and, in addition, to support future information technology requirements by employing converged technologies, such as Voice-over-Internet protocol (VoIP), unified messaging, and IP-based desktop video/audio conferencing and electronic collaboration.

The RFP, issued on May 4, 2004, contemplated the award of a predominantly fixed-price contract, for a base period of 3 years with 7 option years, for the planning, design, transition, implementation, operation, maintenance, and management of the TCE wide area network (WAN). The TCE contractor will be required to provide fully managed end-to-end WAN services between and among various Treasury, government, and commercial locations in the United States, the United States Territories, and internationally, including transport connectivity so as "to achieve seamless communications among the sites and with the Internet," bandwidth management, traffic analysis, network monitoring, ensuring network availability, ensuring security, access control, web-based ordering and billing, management reporting, and other services. The TCE contractor will accept title to the current TCS network assets, "mak[ing] use of any equipment it deems useful in providing network connectivity and managed services," and disposing of the

remainder. Statement of Work (SOW) § C.1.8.1. All equipment required to provide TCE services will be owned, managed, monitored and maintained by the service provider so as to meet specified service levels, including availability requirements of at least 99.99 percent for Category 1 Treasury sites, 99.9 percent for Category 2 Treasury sites, and 99 percent for Category 3 Treasury sites; and limits on latency, jitter and packet loss for various classes of service (CoS), from the most demanding CoS-1 (for such uses as VoIP and video conferencing), to less demanding CoS-2 (for non-real-time traffic requiring better-than-standard service, such as video streaming), and least demanding CoS-3 (for regular business traffic such as e-mail).

The SOW specifically cautioned as follows:

A successful transition from the TCS network to the TCE network is absolutely critical to the Treasury and its Bureaus. The Contractor's approach to and execution of this transition will be the most important factor to the Government in evaluating the performance of the Contractor in the base period of this contract. The Government has identified three main features that the Contractor will provide for transition:

- a) Risk minimization and mitigation;
- b) No compromise of continuity;
- c) Strict adherence to the post-award schedule—neither ahead of nor behind schedule will be acceptable to the Government.

SOW § C.3.2.1.

Award was to be made to the responsible offeror whose proposal was most advantageous and represented the best overall value to the government based upon consideration of price and five non-price criteria: (1) transition, including whether the proposed transition and implementation approach demonstrates a comprehensive, sound, and reasonable approach to ensuring a seamless transition of all sites to the TCE network, demonstrates successful experience in transitioning networks of similar size and complexity, minimizes disruption to business operations, mitigates risk, demonstrates a thorough understanding of the requirements, and assumes responsibility for government equipment so as to reduce the burden to the government for removal of equipment from the government inventory; (2) technical requirements for managed services, including whether the proposal demonstrates a comprehensive, sound, and reasonable approach to providing fully managed WAN services, and whether the approach to continuity of operations and disaster recovery is reasonable and effective, demonstrating redundancy, resiliency, and ability to provide uninterrupted service, as well as the demonstrated ability to recover from unavoidable service disruptions; (3) operations

and management approach to managed services; (4) corporate experience and past performance; and (5) small business participation/subcontracting plan.

The RFP provided with respect to price that, in addition to completing the Schedule B pricing tables furnished with the solicitation, the offeror was to “develop a model delivery order(s) showing their quantities of each Section B CLIN [Contract Line Item Number] needed to support its proposed TCE solution for each of the first 10 years.” RFP § L.10.4. In this regard, the solicitation advised that

[f]or purposes of an award decision, an evaluated price will be derived from the Model Delivery Order(s). The proposed prices for all items, including those in the Model Delivery Order(s) and other proposed items, will also be evaluated for price reasonableness through comparison with other proposed prices, other contract vehicles, as well as through other price analysis techniques. The Model Delivery Order(s) will also be evaluated for consistency with the Managed Services proposal.

RFP § M.3.5. The solicitation further advised that price proposals would be “evaluated for accuracy, completeness, and reasonableness,” and “to determine if prices are realistic for the work to be performed, reflect a clear understanding of the requirements, and are consistent with Offeror’s Managed Services proposal.” Id.

Transition was more important than the other non-price factors when considered individually; technical approach and program operations and management were equal in weight; past performance and small business participation were equal in weight and less important than all other factors. When combined, the non-price factors were approximately equal to price in importance.

Seven proposals were received by the closing time on July 14. Based on its evaluation of initial proposals, Treasury determined that discussions were not required. The evaluation results, as set forth in the October 15 Source Selection Advisory Committee (SSAC) briefing and in the Source Selection Decision Document (SSDD) signed at the conclusion of the SSAC briefing, were as follows:

	Northrop	MCI	Qwest	Broadwing	Level 3	AT&T
Non-Price						
Transition	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]
Technical	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]
Operations and Management	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]
Experience/Past Performance	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]
Small Business	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]
Summary Rating	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]
Price						
Proposed	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]
Evaluated	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]	[DELETED]

The summary evaluation in the SSAC briefing and SSDD indicated that [DELETED] had taken exception to the required performance measures and service levels, rendering its technical approach unacceptable, and had conditioned its pricing such that its prices were actually time-and-materials charges rather than fixed prices. The SSAC briefing stated that [DELETED] had only priced [DELETED] percent of the locations. As for [DELETED], the SSAC briefing stated that it “did not provide pricing for all locations. Pricing is missing for [DELETED]% of sites, many of which are high capacity category 1 locations.” SSAC Briefing at 22. The SSDD, prepared for and signed by the source selection authority (SSA), stated that award to AT&T without discussions was justified on the basis that AT&T’s proposal was the low-priced and the highest-rated, being the only one to receive better (or higher) ratings on all non-price evaluation factors. Award was made to AT&T on December 3. Upon learning of the award, the protesters filed these protests with our Office.

MEMORANDUM OF UNDERSTANDING

On December 2, the day before the award to AT&T, the Chief Information Officer for Treasury (Treasury CIO), the Commissioner of the General Services Administration’s (GSA) Federal Technology Service (FTS), the Administrator of the Office of Management and Budget’s (OMB) Office of Federal Procurement Policy (OFPP), and the Administrator of OMB’s Office of Electronic Government (E-Government) signed a memorandum of understanding (MOU) regarding the possible migration of Treasury’s TCE requirements to the forthcoming GSA FTS-Network telecommunications services contract at the expiration of the 3-year TCE base period.

The protesters assert that the MOU represented a fundamental and material change in the manner in which the determination whether to exercise the options would be made, and that it was unreasonable to require offerors to prepare their proposals without disclosing this information. We agree with the protesters.

MOU Negotiations

The record, including testimony at the hearing our Office conducted in this matter, indicates that GSA FTS, OFPP and Congressional sources made clear to Treasury prior to award of the TCE contract that they disapproved of its proceeding with the TCE contract effort rather than meeting its network requirements under the forthcoming government-wide GSA FTS-Networkx telecommunications services contract. In this regard, approximately 2 weeks after the Treasury CIO assumed his position in the middle of June 2004, he was advised by the GSA FTS Commissioner of GSA's disappointment that it would not have an opportunity to satisfy Treasury's TCE requirements. Hearing Transcript (Tr.) at 442-43. Shortly thereafter, the Treasury CIO learned that there was "a great deal of consternation" at OMB over Treasury's TCE initiative. Tr. at 444-45. Similarly, the record suggests that there was Congressional concern that, by seeking to satisfy its network requirements under its own contract, Treasury was diluting the government's buying power in the marketplace and undercutting GSA's Networkx contract. Tr. at 445-46, 452, 558-59.

In response to these concerns, the Treasury CIO met with the OFPP Administrator in September and suggested that the point when Treasury starts considering options would "be a good time for us to look at and consider whatever it is that GSA has on the table." Tr. at 449-51. The OFPP Administrator responded that "we think we can live with that, but we want something in writing." Tr. at 450. Approximately 1 week later, the Treasury CIO and the FTS Commissioner met and assigned Treasury and GSA teams the task of preparing "something that will allow us to be able to work together collaboratively, that will allow us to be able to assess and evaluate whether Treasury, assuming that we had put into place TCE and assuming that GSA had put into place Networkx, would be in a position where we could do an evaluation or assessment, make a determination which was the better value for the government." Tr. at 451.

An initial draft of the MOU, prepared by Treasury, provided that Treasury would transition its network requirements from TCE to the GSA contract vehicle at the completion of a "cost benefit analysis, if the analysis determines that the FTS contract vehicle is more advantageous for the Treasury." E-mail from SSA to the SSAC Chairman/Director of IRS Procurement, Oct. 1, 2004. However, an October 22 draft prepared by GSA instead described the purpose of the MOU as "defin[ing] the steps both GSA and the Department of Treasury will take to efficiently migrate current and future TCE requirements to the government-wide Networkx program." E-mail from GSA FTS Crossover Manager, Oct. 22, 2004. The SSAC Chairman/Director of IRS Procurement has stated that this provision for definitely transitioning Treasury's network requirements to a GSA contract vehicle,

would represent a fundamental change in the TCE Request For Proposals and that if such language was to be included in the MOU, the

solicitation would be amended to notify offerors of such a change and to appropriately allow the offerors the opportunity to modify their proposals.

Declaration of TCE Program Manager/Technical Chairman, Jan. 19, 2005. The Treasury CIO testified that he viewed GSA's revision of the MOU to be a "breach" and inconsistent with a "cooperative agreement." Tr. at 453-54. The MOU was subsequently revised to provide for a "best value" analysis to determine whether Treasury would transition its network requirements to the forthcoming FTS-Networkx contract. After being reviewed by Congressional staff, the MOU was signed. The TCE contract was then awarded to AT&T. Tr. at 456-59, 509; Declaration of SSAC Chairman/Director of IRS Procurement, Jan. 19, 2005.

MOU Provisions

The stated purpose of the final MOU is as follows:

establishes the roles and responsibilities of [GSA FTS and Treasury] pursuant to determining if the Department of Treasury should migrate its [TCE] requirements to the Government-wide Networkx upon expiration of the TCE contract base period and the award of FTS-Networkx.

MOU at 1. The MOU provides that GSA FTS and Treasury agree: to include Treasury in Networkx planning activities; to "[i]dentify requirements and priorities relevant to current and future TCE needs to be included in the Networkx RFPs"; to allow Treasury to "[p]articipate in government-wide Networkx transition activities"; to exchange TCE and Networkx contract information; and to "reach agreement on common performance metrics and the methodology for defining 'total cost of ownership.'" MOU at 3-4. In this regard, the MOU specifically provided that "[t]ransition costs will not be factored into the cost analysis performed." MOU at 3.

Treasury and GSA FTS further agreed to "work together to conduct a best value analysis, using the methodology agreed to in this MOU, in order to determine whether exercising the TCE option years or transitioning to FTS-Networkx are in the best interest of the Government." *Id.* In this regard, the MOU specifically provided that Treasury "agrees to . . . transition to FTS-Networkx at the completion of the best value analysis if the analysis determines that use of FTS-Networkx is in the best interest of the government." MOU at 4. Further, according to the MOU, "if Treasury and GSA cannot come to agreement or reasonable determination as to best value, Treasury and GSA jointly will present their business case to OMB for adjudication." MOU at 3.

Analysis

Decisionmaking Process

The FAR describes the role of the contracting officer in the exercise of options as follows:

The contracting officer may exercise options only after determining that--

- (1) Funds are available;
- (2) The requirement covered by the option fulfills an existing Government need;
- (3) The exercise of the option is the most advantageous method of fulfilling the Government's need, price and other factors (see paragraphs (d) and (e) of this section) considered; and
- (4) The option was synopsisized in accordance with Part 5 unless exempted

FAR § 17.207(c). Further, the TCE solicitation itself provided that the option exercise decision would focus on the quality of the contractor's performance. Specifically, the RFP provided that

TCE is a performance-based contract with a two-tiered incentive schema. The first tier is based on Contractor performance reflected in a balanced annual scorecard that will be used to determine whether option years will be exercised, and the second tier links Contractor performance to the Contractor's allowable invoice charges on a monthly basis.

RFP § F.3. The scheme as set forth in the RFP was quite elaborate. Under the second tier of the scheme, the contractor's monthly invoices were subject to reduction in the event of poor performance as measured against such performance measures as service capacity installation/upgrade time, scheduled installation success rate, and compliance with site specific service requirements. The first tier of the scheme, that is, the "annual scorecard that will be used to determine whether option years will be exercised," *id.*, consisted of a 12-month total score of the monthly performance scorecard and the average result of an annual customer survey. The RFP linked the exercise of options to the quality of the contractor's annual performance as follows:

F.4 Annual Scorecard Methodology

The following sections represent the second tier of the two-tiered incentive schema. The second tier links annual Contractor performance on a balanced scorecard to the awarding of option years on the contract. The Annual Scorecard comprises 14 performance measures, which will be used to assess the Contractor's performance.

F.4.1 Determination of Option Years

The points scored on each monthly scorecard, in addition to results of a customer survey, will be added to a "running total," or annual score, which will determine option year status. The contract comprises a 3-year base period, and seven 1-year options. If the Contractor does not meet these annual targets the Government may not exercise one or more option years of the contract, starting with the last option year of the contract. The Government will also provide the Contractor with the ability to "earn back" option years of the contract if it has previously lost them.

RFP § F.4.¹

¹ In his testimony, the SSA conceded the paramount role of the contractor's performance in the determination of whether exercise of the options is the most advantageous method of fulfilling the government's needs:

Question: And [offerors] could believe that if the funding was there and the needs were there and they performed well, that they would have a high likelihood of the options being exercised?

....

Answer: I think it's reasonable--at least in my opinion, it was reasonable for a vendor to assume that if they performed based on the metrics that were provided, that they would have an increased likelihood of exercising those out years and--provided that there was availability of funding, which is always a key driver, and that the requirement stayed the same for the Federal Government.

....

But based on a status quo, based on excellent performance, a vendor could reasonably be--be--you know, could assume that they would have a very high likelihood of having those option years exercised by the Government.

(continued...)

The MOU departed from both the FAR framework and the RFP scheme by providing that Treasury and GSA FTS would work together to conduct a best-value analysis using the methodology agreed to in the MOU, to determine whether exercising the TCE options or transitioning to FTS-Networkx would be in the best interest of the government, rather than focus on the TCE contractor's performance record. The provision for OMB to adjudicate any ultimate disagreement between Treasury and GSA if they cannot come to agreement as to best value constitutes a further departure. Although the Treasury CIO testified that Treasury nevertheless would retain the ultimate authority over the exercise of the TCE options, Tr. at 489-92, the MOU unambiguously indicated otherwise. As the SSA testified, the decision under the MOU as to whether to exercise the TCE options will be "a joint decision that should be reached between GSA and the Department of Treasury," and in the event of a disagreement between the two, OMB will "make the final decision."

Tr. at 234-35.² By including in the option exercise decision process the GSA FTS Commissioner and the OFPP Administrator—who were of the view that the best interest of the government was to be found in concentrating the government's buying power, and satisfying Treasury's network requirements, under GSA's Networkx program, and not under a separate Treasury contract—the MOU made the exercise of the options significantly less likely. Likewise, the MOU also made exercise of the options less likely by providing that the best value determination would focus not on Treasury's best interest, but on the best interest of the government as a whole, presumably including GSA and its Networkx contract initiative.³

(...continued)

Tr. at 167-69.

² The Treasury CIO has testified that he did not intend to act inconsistently with the requirements of the FAR with respect to the exercise of options. Tr. at 498-99, 591. Nevertheless, the MOU, on its face, was inconsistent with the requirements of the FAR in that the MOU provided for adjudication by OMB. Moreover, the Treasury CIO also testified that he considered the MOU "binding" and that he and all Treasury personnel under his authority will "comply with the MOU as written." Tr. at 531-32, 544.

³ The Treasury CIO testified that he understood the MOU best-value inquiry to concern only the interest of Treasury. Tr. at 1093-96. However, the record supports a different interpretation, consistent with the MOU's use of the broader phrase "the Government." Specifically, the record includes a copy of the draft MOU (apparently as of October 1), which provides that Treasury agreed to "[t]ransition the TCE to the GSA contract vehicle at the completion of the cost benefit analysis, if the analysis determines that the FTS contract vehicle is more advantageous for the Treasury." E-mail from TCE SSA to SSAC Chairman /Director of IRS Procurement, Oct. 1, 2004. When the Treasury CIO then furnished a copy of the draft MOU to one of two budget examiners at OMB responsible for Treasury matters, she advised as follows:

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Transition Costs

The MOU further departed from the FAR, and made exercise of the options significantly less likely, based on its treatment of transition costs. To the extent that offerors could have reasonably expected that considerations beyond the TCE contractor's performance record would be important in the determination as to whether exercise of the options would be most advantageous, offerors could have reasonably assumed that one important factor would be the expected significant costs, disruptions and risks associated with transitioning Treasury's network requirements from the TCE contract to GSA's Networx contract. In this regard, the FAR provides that in determining whether the exercise of options is most advantageous, the contracting officer "should take into account the Government's need for continuity of operations and potential costs of disrupting operations." FAR § 17.207(e).

The record indicates that the various costs and risks associated with transition of Treasury's network requirements were understood by the agency to be especially significant. In this regard, Treasury's acquisition plan stated that the "largest risk associated with TCE is transition." TCE Acquisition Plan at 4. According to the SSA, "transitions . . . are time-consuming, costly and there's an inherent amount of risk in any transition in terms of downtime and availability and what have you. And it's--it's pretty much a painful process that you go through. And to transition twice would

(...continued)

If by "the Treasury" you mean the government's treasury, then this is OK and should be clarified. If you mean more advantageous for the Department of the Treasury, then there may be a problem. I believe that [the GSA FTS Commissioner] and [the OFPP Administrator] expect to review this 'better value' determination in the most broad sense--best value for the government. This may or may not correspond to best value for the Department.

E-mail from OMB Budget Examiner to Treasury CIO, Oct. 5, 2004. Subsequently, the draft MOU was revised to state that Treasury was committed to moving its requirements to a GSA contract vehicle if doing so was in the "best interest of the government." MOU at 4. In addition, the overall purpose language from the MOU quoted above, providing for determining whether exercise of the TCE options would be "in the best interest of the Government," MOU at 3, was added. In our view, the only reasonable interpretation of these changes is that Treasury had agreed to an MOU providing for an evaluation of best interest on the basis of the government's interest as a whole--presumably including GSA and its Networx initiative--even if not in Treasury's best interest.

be--I would consider that the cruel and unusual punishment.” Tr. at 236. Likewise, the chairman of the technical evaluation team, who was the manager of the TCE contract effort, was “very concerned with transition,” and “consider[ed] transition extraordinarily important and difficult to do.” Tr. at 280. Further, the SSA understood that the continuing availability of the network could not be compromised. Tr. at 238-39. Accordingly, the RFP provided that transition would be the most important non-price evaluation factor, and the SOW specifically cautioned that “[a] successful transition . . . is absolutely critical to the Treasury and its Bureaus.” SOW § C.3.2.1.

In view of the significant costs and risks associated with transitioning Treasury’s network requirements, the technical evaluation team recommended that, in considering whether to transition from TCE to Networx: “Any cost comparison in 3 years must be against total costs. The cost of transition from TCE to Networx must be included. . . . The risk to business operations during transition must be included.” E-mail from Chairman Technical Evaluation Team to TCE Program Manager, Sept. 22, 2004; Tr. at 277-80. In this regard, the monetary costs of any transition were expected to be significant, amounting to “[m]illions of dollars, millions and millions of dollars.” Tr. at 105.

Notwithstanding the magnitude of the likely transition costs in the event of a transition of Treasury’s network requirements to another, Networx contractor, the MOU precluded consideration of transition costs of all types when determining whether to exercise options. Specifically, while the initial draft of the MOU did not address whether the contemplated best-value analysis would include consideration of transition costs, the final MOU was amended to provide that “[t]ransition costs will not be factored into the cost analysis performed.” MOU at 3. (According to the SSA, the term “transition costs” includes a variety of costs, including the “costs of disruption to ongoing operations when you change vendors.” Tr. at 103-05.) Although the SSA recognized that “there were people at the program level that felt very strongly that the transition costs should be included . . . to basically include all costs,” he ultimately concluded that

what we needed to do--I hate to use this word--but was to appease GSA to get on with it so we could award this contract. I did not think that including the--whether we included the transition costs or not--that GSA could be competitive with our procurement.

Tr. at 89. Likewise, according to the Treasury CIO, GSA “argued strenuously” against including transition costs in the best-value analysis, and it was necessary to exclude their consideration as a “concession” to GSA. Tr. at 500-01, 534. Similarly, according to the SSAC Chairman/Director of IRS Procurement, excluding consideration of transition costs also served to “placate OMB.” Tr. at 291. Omission of transition costs--a factor that clearly would have weighed in favor of exercising the options--

from the best-value determination under the MOU served to further erode the likelihood that the options would be exercised.

Failure to Amend Solicitation

Where an agency's requirements change after a solicitation has been issued, the agency must issue an amendment to notify offerors of the changed requirements and afford them an opportunity to respond. FAR 15.206(a); Symetrics Indus., Inc., B-274246.3 et al., Aug. 20, 1997, 97-2 CPD ¶ 59 at 6. An agency must amend the solicitation to reflect a significant change in the government's requirements, even after the submission of final proposal revisions, up until the time of award. Digital Techs., Inc., B-291657.3, Nov. 18, 2004, 2004 CPD ¶ __ at __; NV Servs., B-284119.2, Feb. 25, 2000, 2000 CPD ¶ 64 at 17; see United Tel. Co. of the Northwest, B-246977, Apr. 20, 1992, 92-1 CPD ¶ 374 at 7-9, affd, Department of Energy et al., B-246977.2 et al., July 14, 1992, 92-2 CPD ¶ 20; cf. Occu-Health, Inc., B-270228, B-270228.3, Apr. 3, 1996, 96-1 CPD ¶ 196 at 4 (procuring agency improperly failed to notify offerors that it no longer intended to exercise or evaluate the solicitation's options where it knew this fact prior to the receipt of best and final offers). Amending the solicitation provides offerors an opportunity to submit revised proposals on a common basis that reflects the agency's actual needs. Dairy Maid Dairy, Inc., B-251758.3 et al., May 24, 1993, 93-1 CPD ¶ 404 at 7-9.

Here, the MOU significantly changed the approach to determining whether to exercise the TCE options in ways that, in total, made it significantly less likely that the TCE options would be exercised. In fact, in light of all of the information in the record indicating that all of the other government entities that would be involved in the option exercise decision believed that Treasury's requirement should transition to the GSA Networx contract, it appears that the MOU made it more likely that the options would not be exercised than that they would. This represented a material change to the basis upon which offerors prepared their proposals.⁴ Treasury thus

⁴ In this regard, the SSAC Chairman/Director of IRS Procurement was of the view that changing the TCE contract to a 3-year contract, from a potential 10-year contract, "would represent a fundamental change in the TCE Request for Proposals," Declaration of SSAC Chairman Director of IRS Procurement, Jan. 19, 2005; according to the SSAC Chairman/Director of IRS Procurement, since the "whole concept of a managed service over three years may have been fundamentally changed," offerors would have had to make "significant changes to their proposal" had they been advised that the TCE contract was only a 3-year contract, rather than a 10-year contract. Tr. at 300-02. Likewise, the SSA agreed that offerors might have proposed a different technical solution and price for a three-year as opposed to a 10-year contract. Tr. at 207-08. Likewise, for example, a [DELETED] vice president has stated in a sworn declaration that had [DELETED] known of the MOU's shift in focus for option determination away from the emphasis under the RFP on contractor

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was required to advise offerors of the new approach to determining whether to exercise the TCE options and provide them an opportunity to submit revised proposals on a common basis that reflects the agency's actual needs. Accordingly, we sustain the protest on this basis.

PRICE EVALUATION

The protesters challenge the agency's price evaluation, asserting that the evaluated pricing as reported to the SSA did not reasonably reflect the likely cost to the government of the various proposals. In this regard, the protesters assert that AT&T failed to comply with the solicitation requirement to propose fixed prices; that AT&T submitted an ambiguous price proposal; and that the resulting evaluated price understated the likely costs to be incurred under AT&T's proposal. In addition, several of the protesters challenge the evaluated costs attributed to their proposals.

The RFP required offerors to complete Schedule B pricing tables with local loop prices for different increments of bandwidth for each of the agency's sites in the three categories of sites (Category 1, 2 and 3); network transport prices for each class of service (CoS 1, 2, and 3) and category of site for each increment of bandwidth; and fixed-price labor rates (with estimated quantities) for special projects to be priced on a time-and-materials basis. In addition, offerors were to price specific enhanced services, including managed firewall, intrusion protection, and virus protection, and encrypted links between IRS data centers. Offerors' prices were required to be "fully loaded fixed unit prices, inclusive of all allowances, taxes, surcharges, fees or other applicable price adjustments." RFP § L.10.4.

Of particular importance for these protests, in addition to completing the Schedule B pricing tables furnished with the solicitation, each offeror was required to develop a model delivery order (MDO), from which the offeror's evaluated price would be derived, "showing quantities of each Section B CLIN needed to support its proposed TCE solution for each of the first 10 years." RFP § L.10.4. The solicitation advised that price proposals would be "evaluated for accuracy, completeness, and reasonableness," and "to determine if prices are realistic for the work to be performed, reflect a clear understanding of the requirements, and are consistent with Offeror's Managed Services proposal." RFP § M.3.5.

Agencies generally are required by the Competition in Contracting Act of 1984 (CICA) to include cost or price as a significant factor in the evaluation of proposals.

(...continued)

performance, and the resulting reduced likelihood that the options would be exercised, [DELETED] likely would have modified its approach to [DELETED], its contract pricing approach, and its technical approach. Declaration of [DELETED] Vice President,. Feb. 3, 2005.

41 U.S.C. § 253a(c)(1)(B) (2000); FAR § 15.304(c)(1); Kathpal Techs., Inc.; Computer & Hi-Tech Mgmt., Inc., B-283137.3 et al., Dec. 30, 1999, 2000 CPD ¶ 6 at 9. While agencies have considerable discretion in determining the particular method used in evaluating cost or price, that method should, to the extent possible, accurately measure the cost to be incurred under competing proposals. Eurest Support Servs., B-285813.3 et al., July 3, 2001, 2003 CPD ¶ 139 at 7; Lockheed, IMS, B-248686, Sept. 15, 1992, 92-2 CPD ¶ 180 at 6. Where a source selection decision is based on figures that do not reasonably represent the difference in costs to be incurred under competing proposals, the source selection is not reasonably based. See Preferred Sys. Solutions, Inc., B-292322 et al., Aug. 25, 2003, 2003 CPD ¶ 166 at 9; Gemmo Impianti SpA, B-290427, Aug. 9, 2002, 2002 CPD ¶ 146 at 5-6.

Based upon our review of the record, we find that the agency's price evaluation understated the cost of AT&T's proposal and otherwise was unreasonable. We discuss some examples below.

AT&T Local Loop Pricing

As an initial matter, we agree with the protesters that the local loop pricing in AT&T's MDO did not reasonably reflect the prices to be paid under the contract as set forth in AT&T's Schedule B pricing tables. In this regard, the price evaluation report for AT&T stated that AT&T's "Section B, CLIN prices, do not readily correspond to the unit prices used to derive the evaluated price in the [MDO]," such that the evaluator was "unable to determine that the evaluation price for the local loop pricing was correctly computed." AT&T Price Evaluation Report, Aug. 16, 2004, at 6-7. The evaluation report concluded as follows:

While well prepared, AT&T's price proposal still contains some errors and ambiguities that need clarification, the most significant being the local loop prices in its [MDO] which constitutes approximately [DELETED] of the total [MDO] price. Upon adequate resolution of these issues and concerns, a technical evaluation of the Offeror's price proposal should be completed as part of the cost realism review.

Id. at 8.

The record indicates that the uncertainty with respect to whether AT&T's MDO price, upon which its pricing was evaluated for award, accurately corresponded to the solicitation Schedule B tables, under which AT&T would be paid during contract performance, resulted in part from the fact that [DELETED].⁵

Treasury, on the other hand, notes that AT&T's [DELETED].

⁵ Similarly, the protesters have noted [DELETED].

We find Treasury's evaluation of AT&T's local loop pricing to be unreasonable. Treasury has not explained, nor is it otherwise apparent, why AT&T in performing the TCE contract would not be justified in pricing requested service at a Category 1 site under the corresponding Category 1 entry in its contract table B-2, and pricing requested service at a Category 2 site under the corresponding Category 2 entry in its contract table B-2 [DELETED]. Since AT&T's MDO pricing was lower than the corresponding Schedule B [DELETED] pricing [DELETED], the evaluated price reported to the SSA, which was based upon the MDO pricing, was unreasonable. As for whether AT&T's Category 1 entry in its contract table B-2 [DELETED], we find the proposal in this regard at best ambiguous; the B-2 table references [DELETED] do not unambiguously indicate that [DELETED].

Number of Sites

The evaluated prices as reported to the SSA improperly failed to reflect a common number of sites to be serviced. Treasury reports that the solicitation attachment listing 1,042 Treasury sites for which service was required included a number of errors. Second Agency Report at 20. As a result, and as recognized in Treasury's price evaluation reports, offerors' MDOs were based on different total numbers of sites to be served, as well as different numbers of high bandwidth Category 1, lesser bandwidth Category 2, and least bandwidth Category 3 sites, as follows:

	Category 1	Category 2	Category 3	Total
[DELETED]	70	63	862	995
[DELETED]	73	66	916	1,055
[DELETED]	63	76	857	996
[DELETED]	58	83	855	996
[DELETED]	61	77	828	966
[DELETED]	54	59	850	963
[DELETED]	102	117	618	837

However, notwithstanding the significant differences with respect to the total number of sites and numbers of sites within each category in the offerors' MDOs, Treasury did not adjust offerors' proposed prices so as to ensure that the evaluated prices reflected a common number of sites to be serviced. For example, Treasury did not adjust [DELETED]'s evaluated price upward notwithstanding the fact that, by Treasury's own calculation, [DELETED] had excluded from its MDO pricing [DELETED] sites for which service was required. Based upon the assumption that the omitted sites were a representative sample of the total universe of sites, and because the [DELETED] sites represented approximately [DELETED] percent of the 1,042 sites listed in the agency attachment, Treasury reports that it determined that the [DELETED] omitted sites warranted an upward adjustment to [DELETED]'s proposed price of between [DELETED] (a [DELETED] percent increase in [DELETED]'s proposed price) and [DELETED]. Second Agency Report at 20, 42-43;

Tr. at 657-59, 777-79. However, although the SSA had specifically questioned the TCE Program Manager/Technical Chairman as to whether [DELETED]'s price was complete, the SSA was not advised of this required upward evaluated price adjustment, with the result that the SSA erroneously concluded that no changes in [DELETED]'s proposal were required. Tr. at 782, 1253, 1349. In our view, Treasury's failure to base the evaluated prices for all offerors on a common number of sites to be serviced was unreasonable.

In addition, it appears the SSAC briefing presented to the SSA, and the draft SSDD prepared for the SSA, were misleading in the characterization of [DELETED]'s price proposal as it related to the number of sites priced. The SSAC briefing did not include an evaluated price for [DELETED] on the basis that [DELETED] "did not provide pricing for all locations. Pricing is missing for [DELETED]% of sites, many of which are high capacity category 1 locations." SSAC Briefing at 22. Likewise, while the draft SSDD prepared for the SSA specified as the evaluated price for [DELETED] its proposed price, it stated that [DELETED] would not be able to lower its prices because it had "failed to price [DELETED] sites, the majority of those sites were the Class of Service 1 sites, which are the highest in price." SSDD at 7. In contrast, [DELETED]'s price proposal was described as "complete and accurate." Id. In fact, [DELETED]'s MDO pricing included [DELETED] sites, only [DELETED] fewer than [DELETED]'s MDO pricing. In our view, the respective characterizations of [DELETED]'s and [DELETED]'s price proposals did not reasonably reflect the extent of the similarity between [DELETED]'s and [DELETED]'s pricing.⁶

AT&T [DELETED]

The record further indicates that AT&T failed to propose the required fixed prices. As noted above, offerors were required to propose "fully loaded fixed unit prices, inclusive of all allowances, taxes, surcharges, fees or other applicable price adjustments." RFP § L.10.4. AT&T's price proposal, however, stated as follows:

[DELETED]

AT&T Price Proposal, § C.2.1.2. Since AT&T's prices were [DELETED], it is clear that AT&T failed to offer the required "fully loaded fixed unit prices, inclusive of all allowances, taxes, surcharges, fees or other applicable price adjustments." RFP § L.10.4. Indeed, in response to [DELETED]'s similar [DELETED], the agency's price analysis report for [DELETED] stated that "[t]his is contrary to the Solicitation

⁶ While it appears that [DELETED] included somewhat fewer Category 1 sites ([DELETED]) than did [DELETED] ([DELETED]), the SSAC briefing and SSDD did not reasonably reflect the relative difference in this regard.

requirement for fixed prices.” [DELETED] Price Evaluation Report at 16. Treasury nevertheless accepted AT&T’s pricing as proposed, characterizing the pricing as “complete and accurate,” SSDD at 7, and made no adjustments in this regard in the evaluated price reported to the SSA. This failure to account for the conditional nature of AT&T’s pricing was unreasonable.

AT&T Increase in Bandwidth

The RFP required that offerors “assume 5% growth in bandwidth capacity per site per year for each year of the TCE contract.” RFP § L.10.4. Although AT&T generally referred in its proposal to [DELETED], AT&T Price Proposal, § C.2.2.3, Treasury’s price evaluation report for AT&T indicated that “[w]e are unable to verify if the 5% growth in bandwidth capacity each year . . . were implemented in” AT&T’s MDO. AT&T Price Evaluation Report, Oct. 8, 2004, at 2. Treasury maintains that it was reasonable to assume that AT&T in fact complied with the bandwidth growth requirement on the basis that [DELETED]. Treasury concedes, however, that it was unable to ascertain from AT&T’s MDO, and thus did not in fact determine, whether AT&T’s MDO pricing in fact reflected the required “5% growth in bandwidth capacity per site per year for each year of the TCE contract.” RFP § L.10.4; Tr. at 661-64, 870-72. In these circumstances, where [DELETED], we find that Treasury lacked a reasonable basis for concluding that AT&T’s MDO pricing took this requirement into account.

Months in First Contract Year

As noted in the price evaluation reports for the protesters, while AT&T’s MDO was based on a first contract year consisting of 9 months, the protesters’ MDOs, incorrectly in the agency’s view, were based on a first contract year consisting of 12 months. Level 3 Price Evaluation Report at 4; MCI Price Evaluation Report at 7; Broadwing Price Evaluation Report at 6; NG Price Evaluation Report at 4; Qwest Price Evaluation Report at 6. However, the evaluated prices for the protesters in the SSAC briefing and SSDD did not reflect the necessary reduction to ensure evaluation on a common basis, that is, on the basis of a 9-month first contract year. In its report responding to the protests, Treasury has calculated the resulting reduction in the protesters’ first year pricing as no more than a 25 percent decrease, and more likely only a 10 to 15 percent reduction (because vendors typically amortize transition costs over the first 18 months of any contract). Second Agency Report at 44. Even if the error is at the lower end of this range, we find that Treasury’s failure to properly take into account in the evaluated prices reported to the SSA the offerors’ differing assumptions as to the length of the first contract year was unreasonable.

Price Realism

The protesters assert that Treasury did not reasonably evaluate the realism of AT&T’s prices. In this regard, the solicitation provided that price proposals would

be evaluated “to determine if prices are realistic for the work to be performed, reflect a clear understanding of the requirements, and are consistent with Offeror’s Managed Services proposal.” RFP § M.3.5.

Where, as here, an RFP contemplates the award of a fixed-price contract, the agency generally is not required to conduct a realism analysis; this is because a fixed-price (as opposed to a cost-type) contract places the risk and responsibility for loss on the contractor. WorldTravelService, B-284155.3, Mar. 26, 2001, 2001 CPD ¶ 68 at 3; PHP Healthcare Corp., B-251933, May 13, 1993, 93-1 CPD ¶ 381 at 5. However, an agency may, as the agency did here, provide for the use of a price realism analysis for the limited purpose of measuring offerors’ understanding of the requirements or to assess the risk inherent in an offeror’s proposal. PHP Healthcare Corp., *supra*. The nature and extent of a price realism analysis ultimately are matters within the sound exercise of the agency’s discretion, and our review of such an evaluation is limited to determining whether it was reasonable and consistent with the solicitation’s evaluation criteria. Cortez, Inc., B-292178 *et al.*, July 17, 2003, 2003 CPD ¶ 184 at 3; Rodgers Travel, Inc., B-291785, Mar. 12, 2003, 2003 CPD ¶ 60 at 4.

Here, the agency’s contemporaneous documentation of the evaluation of whether AT&T’s prices were realistic included little more than the conclusion in the SSDD that AT&T’s proposed prices “are determined reasonable and realistic,” and a brief mention of AT&T in the agency’s 1 and 1/3-page Summary of Price Feasibility for all offerors, as follows:

AT&T

AT&T’s solution [DELETED]. The price appears to accurately reflect the costs associated with [DELETED].

Summary of Price Feasibility at 2. In its report to our Office on the protests, Treasury states that the agency reviewed each proposal “at a high level across four broad factors,” including the offeror’s current assets and capabilities, what the offeror planned to build, what the offeror planned to integrate from teaming partners, and what the offeror planned to buy. Second Agency Report at 13-14. When asked at the hearing to explain the price realism evaluation of AT&T’s proposal, the TCE Program Manager/Technical Chairman cited the above four-factor approach and generally referred to the fact that (1) AT&T [DELETED]. Tr. at 718-22, 1123-30.

However, neither the TCE Program Manager/Technical Chairman in his testimony, nor the agency otherwise, furnished any details as to how the agency concluded that AT&T’s prices reasonably reflected its likely costs of furnishing [DELETED]. The apparent conclusion that AT&T had a viable approach to performing the contract did not indicate that the prices proposed for that approach were realistic. Thus, we find that the agency procurement record does not show that the agency undertook a reasonable price realism evaluation.

CONCLUSION

We sustain the protests on the basis that the changes introduced in the MOU relative to the approach to option determination set forth in the solicitation and the FAR, made it significantly less likely that the TCE options would be exercised, thus materially altering the basis upon which offerors prepared their proposals. We also sustain the protests on the basis that the agency's price evaluation was unreasonable in that it understated the cost of AT&T's proposal, failed to account for ambiguities in AT&T's proposal, and failed to ensure that the price evaluation was on a common basis.⁷

We recommend that the agency amend the solicitation to reflect its actual approach to option determination, open discussions with all offerors, obtain revised proposals, and evaluate the revised proposals in a manner consistent with the solicitation requirements.⁸ If Treasury determines that an offeror other than AT&T has submitted the best-value proposal, the agency should terminate AT&T's contract and make award to that other offeror. We also recommend that the agency reimburse the protesters their costs of pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d) (2004). The protesters should submit their certified claims for costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days of receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protests are sustained.

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General Counsel

⁷ Although we have not addressed all of the protesters' challenges to the evaluation, it appears that the challenges concern matters that are susceptible to being eliminated by discussions. Since we are recommending that Treasury conduct discussions with offerors, the agency should raise during those discussions the agency's concerns with the offerors' proposals.

⁸ In the event that it is in fact no longer likely that Treasury will exercise the TCE options, such that it is not in the best interest of the government to include the options in the evaluation, the agency should amend the solicitation to delete the provision for option evaluation and provide offerors an opportunity to submit revised proposals on a common basis that reflects the agency's actual needs in this regard. See FAR § 17.206.